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CHAPTER 10

Torts

PETER A. DONOVAN*

§ 10.1. Sale of Alcoholic Beverages — Minors. During the *Survey* year, in *Michnik-Zilberman v. Gordon's Liquor, Inc.*¹ the Massachusetts Supreme Judicial Court extended tort liability to retail sellers of alcoholic beverages for injuries arising from the sale of alcohol to minors.² In reaching this holding, the Court concluded that injury inflicted by a minor while driving an automobile was a foreseeable consequence of the sale of alcohol to the minor.³ The decision follows the recent legislative and case law trend holding that the sale of alcoholic beverages to a minor may render the merchant liable to third persons involved in an automobile collision with the minor.⁴

Vendors in Massachusetts have a duty to refrain from selling alcohol to persons whom they know or should know are minors. In chapter 138, section 34B, the Legislature approved two cards, a liquor identification card and a driver's license, on which retailers of alcoholic beverages may reasonably rely to ascertain the age of youthful customers.⁵ A vendor may protect himself from tort liability by maintaining a record of the identification cards of any person with a youthful appearance to whom it sells liquor.⁶ Moreover, if a vendor makes a mistake of fact in reasonably relying on the driver's license or liquor identification card of a minor to whom it sells alcohol, the vendor may use that mistake in defending itself against future negligence claims.⁷ Failure to request the identification approved by the Legislature, however, is probative on the issue of whether a vendor should have known a person was a minor whenever the individual has a youthful appearance.⁸

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§ 10.1. ¹ 390 Mass. 6, 453 N.E.2d 430 (1983).

² *Id.* at 7, 453 N.E.2d at 431.

³ *Id.* at 12, 453 N.E.2d. at 434.

⁴ See Donovan, *Torts*, 1982 ANN. SURV. MASS. LAW § 11.1, at 1.

⁵ 390 Mass. at 11, 453 N.E.2d at 434.

⁶ *Id.*

⁷ *Id.* at 11 n.5, 453 N.E.2d at 434 n.5.

⁸ *Id.* at 13, 453 N.E.2d at 435.

In *Michnik-Zilberman*, the retailer argued that tort liability should exist only when a sale of alcohol is made to an intoxicated customer.⁹ Alternatively, the retailer contended that it would be an unprecedented step for the Court to extend liability to package stores for injuries arising from sales to minors.¹⁰ Rejecting these arguments, the Court concluded that a sale of alcohol to a minor is evidence of negligence on the retailer's part even if the minor is not intoxicated at the time of the sale.¹¹ The Court further concluded that it is the sale or furnishing of alcohol which is critical to finding a retailer liable in tort.¹² In reaching this conclusion the Court analogized to the general rule that a person may be found negligent for furnishing a dangerous instrumentality to a child who uses it to cause harm because of the grave consequences which may foreseeably follow.¹³

Addressing the issue of proximate cause, the Court stated that a vendor's negligent sale of alcohol to a minor could lead to tort liability if the minor's actions while under the influence of alcohol and the harm caused as a result, were reasonably foreseeable.¹⁴ Although there was evidence in *Michnik-Zilberman* that the vendor did not know that the minor would drive while intoxicated, the Court nevertheless concluded that the accident which occurred fell within the scope of the risk created.¹⁵ Consequently, according to the Court, it was not necessary that the plaintiff prove the store's ability to foresee the actual manner in which harm might occur.¹⁶

Michnik-Zilberman suggests that a retailer of alcoholic beverages who sells to a sober person who it knows or should know is a minor becomes an insurer covering harm subsequently caused by that minor. In *Carey v. New Yorker of Worcester, Inc.*,¹⁷ a case involving the negligence of a tavern owner in supplying an intoxicated person with alcoholic beverages, the Supreme Judicial Court stated that serving hard liquor has a consequence which is not successfully open to dispute. Such action, the *Carey* Court continued, may make the intoxicated individual unreasonably aggressive and enhance a condition in which almost any irrational act is foreseeable.¹⁸ In light of the *Michnik-Zilberman* Court's analogy of the retail seller of alcoholic beverages to a tavern owner, the *Carey* reasoning should apply equally to retail sellers of alcohol. Moreover, the Court in

⁹ *Id.* at 10, 453 N.E.2d at 433.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 10 n.4, 453 N.E.2d at 433 n.4.

¹⁴ *Id.* at 13, 453 N.E.2d at 434.

¹⁵ *Id.* at 13, 453 N.E.2d at 435.

¹⁶ *Id.* at 13-14, 453 N.E.2d at 435.

¹⁷ 355 Mass. 450, 245 N.E.2d 420 (1969).

¹⁸ *Id.* at 453, 243 N.E.2d at 422.

Michnik-Zilberman noted that the statutory prohibition of sales of alcoholic beverages to minors as a class was enacted because the Legislature recognized their susceptibilities and the intensification of the otherwise latent dangers when those who lack maturity and responsibility drink.¹⁹ Although the *Michnik-Zilberman* Court did not specifically address the possible consequences of its holding that a retail seller who negligently sells alcoholic beverages to a minor might thereby become an insurer covering harm subsequently caused by that minor, the Court observed that one readily foreseeable risk created by such retailer negligence is that the minor may drive and cause harm to others while intoxicated.²⁰ As a result of this decision, retail sellers of alcohol should be advised to carefully check and keep a record of the identification cards of purchasers who have a youthful appearance.

§ 10.2. Medical Malpractice — Duty to Inform — Mental Distress. In *DiGiovanni v. Latimer*¹ the plaintiff brought suit for injuries allegedly sustained as a result of her doctor's failure to inform her that he had excised a portion of one of her fallopian tubes during surgery to remove an ovarian cyst.² On appeal from the findings of a medical malpractice tribunal, the Massachusetts Supreme Judicial Court affirmed the tribunal's conclusions, ruling that the plaintiff had not demonstrated that her physician's alleged negligence caused her injuries which were legally compensable.³

In *DiGiovanni* the plaintiff claimed that her physician's failure to inform her that he had removed one fallopian tube during surgery caused her both emotional and physical harm.⁴ To support this claim, the plaintiff offered expert testimony that the removal of one fallopian tube inevitably makes conception more difficult.⁵ The plaintiff asserted that she suffered two distinct types of harm during the thirteen years she was unaware that her physician had removed one fallopian tube.⁶ First, the plaintiff argued that, because she was not aware that she had only one fallopian tube, she did

¹⁹ 390 Mass. at 11, 453 N.E.2d at 433.

²⁰ *Id.* at 12, 453 N.E.2d at 434.

§ 10.2. ¹ 390 Mass. 265, 454 N.E.2d 483 (1983).

² *Id.* at 266, 454 N.E.2d at 484. A medical malpractice tribunal had earlier entered a report which concluded that evidence presented in this case was insufficient under G.L. c. 231, § 261 to raise a legitimate question of liability appropriate for judicial inquiry. *Id.* at 266, 454 N.E.2d at 484.

³ *Id.* at 269, 454 N.E.2d at 485-86. In so ruling, however, the Court did not address the question, presented for the first time, whether the failure to inform a patient of something that happened during an operation or other medical procedure breaches a physician's legal duty. *Id.*

⁴ *Id.* at 269, 454 N.E.2d at 486.

⁵ *Id.*

⁶ *Id.* at 269-70, 454 N.E.2d at 486.

not pursue additional steps to help her conceive.⁷ In addition, the plaintiff argued that she suffered severe emotional distress because she could not become pregnant, although she had been told that there was no physical reason why she could not conceive.⁸ Second, the plaintiff also alleged that after she was informed in 1978 that one fallopian tube had been removed during the earlier surgery, her emotional distress aggravated a previously controlled epileptic condition.⁹

Addressing the first argument, the *DiGiovanni* Court found that the plaintiff had not adequately demonstrated that other steps were available to increase the likelihood of conception.¹⁰ According to the Court, the plaintiff, before a medical tribunal, must present not mere allegations or an oral offer of proof by counsel, but rather evidence which can be properly substantiated at trial.¹¹ In *DiGiovanni* the Court determined that the plaintiff's bare statement in her affidavit that she did not take other steps to become pregnant was insufficient to warrant finding that the defendant negligently inflicted emotional distress.¹² The Court found this conclusion especially compelling in light of its conclusion that the availability of pregnancy enhancing procedures was not a matter of common knowledge.¹³

The Court next addressed the plaintiff's claim concerning her epileptic condition.¹⁴ Again, the Court concluded that a bare affidavit statement that there existed a causal relationship between the plaintiff's emotional distress and her aggravated epileptic condition was insufficient.¹⁵ In reaching this conclusion, the Court noted that determining whether emotional distress has resulted in a physical injury presents a difficult medical question.¹⁶ In the absence of proffered medical testimony connecting the seizures to the mental distress, the Court elected to follow *Payton v. Abbott Labs*¹⁷ and held that the plaintiff's claim in *DiGiovanni* for negligent infliction of emotional distress did not present a legitimate question of liability appropriate for judicial inquiry.¹⁸ Under *Payton*, a plaintiff suing to recover for negligently inflicted emotional distress must allege and prove that she has sustained physical harm as a result of the conduct

⁷ *Id.*

⁸ *Id.* at 270, 454 N.E.2d at 486.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 269, 454 N.E.2d at 485.

¹² *Id.* at 270, 454 N.E.2d at 486.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 386 Mass. 540, 437 N.E.2d 171 (1982).

¹⁸ 390 Mass. at 271, 434 N.E.2d at 486.

which caused the emotional distress.¹⁹ A plaintiff's physical harm must therefore either cause or be caused by the emotional distress alleged, and the physical harm must be manifested by objective symptomatology and substantiated by expert medical testimony.²⁰ In *DiGiovanni* the plaintiff's claims failed because she did not demonstrate either that her physician's failure to inform resulted directly in physical harm which in turn caused her emotional distress, or, conversely, that his failure to inform caused her emotional distress which in turn caused a physical harm.²¹

The three policy reasons articulated in *Payton* for denying recovery for negligently inflicted emotional distress in the absence of physical harm precluded the imposition of liability in *DiGiovanni* for emotional distress.²² These policy reasons are (1) that emotional distress which is not so serious as to have physical consequences is likely to be "so temporary, so evanescent and so relatively harmless" that the task of compensating for it would unduly burden defendants and the court; (2) that in the absence of the guarantees of genuineness provided by resulting physical harm, such emotional distress too easily can be feigned or imagined; and, (3) that where the defendant's conduct has been merely negligent, without intent to harm, his fault is not so great that he should be required to compensate the plaintiff for mental disturbance.²³ These reasons were essentially unaffected by the possible arguments in *DiGiovanni*, acknowledged by the Court, that the relationship between a physician and a patient is fiduciary in nature, that a plaintiff has a right to determine what shall be done or not done with his or her body, and that a patient has an obvious interest in being informed of what a physician has done in the course of treatment.²⁴

The *DiGiovanni* Court also apparently read *Payton* as a limitation upon the test articulated in *Agis v. Howard Johnson, Co.*,²⁵ for determining when a plaintiff can recover for intentionally inflicted emotional harm.²⁶ Because the plaintiff in *DiGiovanni* alleged that the defendant intentionally withheld from her information about the removal of one fallopian

¹⁹ 386 Mass. at 544, 437 N.E.2d at 174.

²⁰ *Id.*

²¹ *Id.*

²² *See id.* at 272, 454 N.E.2d at 487.

²³ 386 Mass. at 553, 437 N.E.2d at 180.

²⁴ 390 Mass. at 272, 454 N.E.2d at 487.

²⁵ 371 Mass. 140, 355 N.E.2d 315 (1976).

²⁶ "It must be shown (1) that the actor intended to inflict emotional distress or that he knew or should have known that the emotional distress was the likely result of his conduct; (2) that the conduct was 'extreme and outrageous,' was 'beyond all bounds of decency' and was 'utterly intolerable in a civilized community'; (3) that the actions of the defendant were the cause of the plaintiff's distress; and, (4) that the emotional distress sustained by the plaintiff was 'severe' and of a nature 'that no reasonable man could be expected to endure it.'" *Id.* at 144-45, 355 N.E.2d at 318-319.

tube,²⁷ she satisfied each of the *Agis* requirements, with the possible exception of extreme and outrageous conduct. In *Agis* a manager of a restaurant informed the restaurant's waitresses that someone was stealing from the restaurant and that, until the identity of the thief could be established, the manager would begin firing the waitresses in alphabetical order — whereupon he fired the plaintiff, whose name began with "A."²⁸ The *Agis* Court read the plaintiff's complaint to allege facts and circumstances which reasonably could lead the trier of fact to conclude that the defendant's conduct was extreme and outrageous.²⁹ In *DiGiovanni*, the Court was unwilling to determine that the evidence presented by the plaintiff raised a legitimate question of liability appropriate for judicial inquiry, despite the fact that the evidence suggested concealment by the defendants which may have been fraudulent. Instead, the Court focused on the plaintiff's complaint and stated that there was no allegation, argument, or suggestion that the defendant's conduct was of the extreme and outrageous nature required under *Agis* for recovery for intentionally inflicted emotional distress.³⁰

The Court's reasoning in *DiGiovanni* seems inconsistent with *Agis*, since the defendant's concealment in *DiGiovanni* effectively prevented the plaintiff from obtaining information at the time of her surgery about whether her doctor's actions were tortious. If the plaintiff had been notified of the defendant's actions at the time of surgery, she might have been able to establish either negligent or intentional malpractice and thus have been able to recover for her diminished capacity to conceive.³¹ *DiGiovanni* enables a doctor who obtains broad consent from his patient with respect to a particular operation to then fraudulently conceal possibly tortious action taken in the course of the authorized procedure. The holding thus effectively licenses the intentional infliction by doctors of emotional distress upon patients in instances where the intentional infliction results in no physical harm, and where the accompanying negligence or intentional malpractice later proves impossible to establish. This certainly seems to license a caliber of behavior which is far more outrageous than that condemned in *Agis*.

§ 10.3. Medical Malpractice — Causation — Apportionment of Damages.
In *Glicklich v. Spievack*¹ the plaintiff brought a malpractice action on

²⁷ 390 Mass. at 273, 434 N.E.2d at 487.

²⁸ 371 Mass. at 141, 355 N.E.2d at 317.

²⁹ *Id.* at 143, 355 N.E.2d at 319.

³⁰ 390 Mass. at 273, 434 N.E.2d at 487-88.

³¹ The Court emphasized that the plaintiff's complaint raised only the defendant's failure to inform after the surgery, and that there were no allegations concerning negligent performance, informed consent, or nonconsensual treatment. 390 Mass. at 266 n.1, 434 N.E.2d at 484 n.1

§ 10.3. ¹ 16 Mass. App. Ct. 488, 452 N.E.2d 287 (1983).

behalf of herself and her nine year old son to recover for damages sustained as a result of the alleged negligence of several physicians in the diagnosis and treatment of her breast cancer.² As a result of delay in treatment resulting from the incorrect diagnosis, the plaintiff's cancer metastasized and her life expectancy decreased from a fifty percent chance of a ten year survival to a possible lifespan of one or two years.³ The jury returned separate verdicts against two of the defendant doctors, finding one responsible for \$59,996 and the other responsible for \$339,979.⁴ The verdicts also divided the recovery, granting separate damages to the plaintiff mother and her son.⁵ Judgments notwithstanding the verdicts were granted in favor of both doctors on the trial judge's finding of insufficient evidence upon which a jury could conclude that any malpractice on the part of the doctors was causally related to the injury sustained by the plaintiffs.⁶ The trial judge further held, however, that, if the defendants were liable, the jury was warranted in finding (1) that the plaintiff-son was economically dependent on his mother and therefore was entitled to recover damages, and (2) that the two doctors were not joint tort-feasors and that the negligence of the doctor principally at fault was not foreseeable by the doctor who referred the patient to him.⁷ The judge then reported his rulings to the Appeals Court.⁸

The Appeals Court reversed, concluding that there was sufficient evidence upon which a jury could conclude that there was malpractice which was causally related to the injuries sustained by the plaintiffs.⁹ Specifically, the court held that the plaintiffs could recover upon proof by a fair preponderance of the evidence that the mother most probably would not have been injured to the same extent had proper treatment been administered.¹⁰ At trial, the primary medical expert on causation had stated that he was unable to assert precisely at what time the mother's cancer metastasized or became inoperable, because the rate at which cancer spreads cannot be exactly determined.¹¹ The court noted that the trial judge, relying upon this statement in ruling for the defendants, had stated that the jury could not have rationally determined what damage was caused by the inevitable course of the plaintiff's cancer, and thus could not have rationally assessed damages.¹²

² *Id.* at 489, 452 N.E.2d at 288.

³ *Id.* at 495, 452 N.E.2d at 292.

⁴ *Id.* at 489, 452 N.E.2d at 288.

⁵ *Id.* at 489, 452 N.E.2d at 287.

⁶ *Id.*

⁷ *Id.* at 489, 452 N.E.2d at 288-89.

⁸ *Id.* at 489, 452 N.E.2d at 289.

⁹ *Id.* at 493, 452 N.E.2d at 291.

¹⁰ *Id.* at 493, 452 N.E.2d at 290.

¹¹ *Id.* at 493, 452 N.E.2d at 291-92.

¹² *Id.* at 493, 452 N.E.2d at 291.

In reversing the trial court's decision, the Appeals Court focused on the medical expert's assertion that he could predict with reasonable certainty what would have happened to the plaintiff had she received treatment which met accepted standards of medical care.¹³ The expert testified that the plaintiff would have had an increased lifetime expectancy over a ten and fifteen year follow-up period had she received proper care.¹⁴ Noting that the plaintiff was not required to show the exact cause of her injuries or to exclude all possibility that they resulted without fault on the part of the defendants,¹⁵ the court ruled that the expert testimony presented at trial was sufficient to meet the plaintiff's legal burden with regard to proximate cause.¹⁶

The court next considered the trial judge's holding that, if the defendants were liable, the jury was warranted in awarding damages to the plaintiff-son on the theory that he was economically dependent upon his mother.¹⁷ The defense had complained that no evidence was introduced showing that the son was in fact economically dependent on his mother.¹⁸ Previously, in *Ferriter v. Daniel O'Connell's Sons*,¹⁹ the Supreme Judicial Court had indicated that before a child can recover for loss of parental society the child must prove both economic and "filial-need" dependence.²⁰ The *Glicklich* court rejected the argument that both these aspects of dependence were necessary, and concluded that it was clear from *Ferriter* that the injured parent need not be the principal wage earner for her child to recover for loss of parental society.²¹ The court determined that recovery would be allowed when the child was in the injured parent's household and was dependent on the parent for management of his physical needs, for emotional guidance and for support.²² Therefore, the *Glicklich* Court found the evidence that the plaintiff prepared her son's meals, discussed his day with him, read him stories and generally took an

¹³ *Id.* at 493, 452 N.E.2d at 292.

¹⁴ *Id.* at 493-95, 452 N.E.2d at 291-92. The trial judge had concluded that the plaintiff failed to meet the burden of proving proximate cause in part because she had failed to demonstrate that she would have had a biopsy performed had Drs. Golub or Spievack so advised her. The Appeals Court disagreed, observing that the law presumes that a warning, if given, will be heeded. *Id.* at 493, N.E.2d at 290-91.

¹⁵ *Id.* at 495, 452 N.E.2d at 292.

¹⁶ *Id.* at 493-95, 452 N.E.2d at 291-92.

¹⁷ *Id.* at 496, 452 N.E.2d at 292.

¹⁸ *Id.*

¹⁹ 381 Mass. 507, 413 N.E.2d 690 (1983).

²⁰ *Id.* at 516, 413 N.E.2d at 696. The *Ferriter* Court held that children have a viable claim for loss of parental society if they can show that they are minors dependent on the plaintiff parent. *Id.* This dependence must be rooted not only in economic requirements, but also in filial needs for closeness, guidance and support. *Id.*

²¹ 16 Mass. App. Ct. at 496, 452 N.E.2d at 292.

²² *Id.* at 496, 452 N.E.2d at 292.

interest in his play, school and friends was sufficient evidence upon which the jury could award the son damages for loss of parental society and guidance caused by medical negligence.²³

The Appeals Court in *Glicklich* also rejected the contention of the doctor who was found principally at fault that the plaintiff suffered a single indivisible injury which required an award of damages in a single amount against both defendants.²⁴ The court applied the principle of the Restatement (Second) of Torts that “[d]amages may be apportioned among two or more causes if there is a reasonable basis for doing so.”²⁵ Because the court accepted the evidence of causation introduced by a medical expert as legally sufficient, it concluded that the further decrease in the plaintiff’s lifetime expectancy resulting from the second doctor’s later failure to inform the plaintiff to have a biopsy could reasonably have been found to constitute an independent event not foreseeable by the referring doctor who first failed to advise the mother to have a biopsy.²⁶

Under *Glicklich*, a medical malpractice action will lie when it is more probable than not that the defendant physician’s conduct, while not hastening death, reduced the patient’s chance of survival. In addition, *Glicklich* extended a physician’s liability to a plaintiff’s children in a medical malpractice action in those circumstances where the plaintiff is not the household’s principal wage earner, but provides for the children’s physical, emotional and mental needs.

§ 10.4. Colleges — Duty of Care — Campus Security. During the *Survey* year, the Supreme Judicial Court addressed the issue of a college’s duty to provide reasonable security on campus to protect students from rape. In *Mullins v. Pine Manor College*¹ a civil suit was brought against a college and its vice-president for operations by one of the college’s students, alleging that negligent deficiencies in the college’s security system were the proximate cause of her rape.² The jury returned verdicts against the college and its vice-president in the amount of \$175,000, which was reduced by the trial judge to \$20,000 pursuant to Massachusetts’ charitable immunity statute.³ On appeal, the Supreme Judicial Court affirmed the lower court’s judgment.

The Court initially noted that the general rule that there is no duty to protect others from the criminal or wrongful acts of third persons was not

²³ *Id.*

²⁴ *Id.* at 496-97, 452 N.E.2d at 292.

²⁵ *Id.* at 497, 452 N.E.2d at 293 (citing RESTATEMENT (SECOND) OF TORTS §433A (1965)).

²⁶ 16 Mass. App. Ct. at 497-98, 452 N.E.2d at 293.

§ 10.4. ¹ 389 Mass. 47, 449 N.E.2d 331 (1983).

² *Id.* at 47-48, 449 N.E.2d at 333.

³ See G.L. c. 231, § 85(k), 389 Mass. at 48, 449 N.E.2d at 333.

applicable to the facts before it.⁴ The Court stated that the duty of due care owed by colleges and their administrators to their resident students could be partly based on societal values and customs.⁵ Under this basis for liability, the Court found the duty of care firmly embedded in community consensus and supported by the fact that colleges of ordinary prudence usually exercise care to protect the well-being of their resident students, including seeking to protect them against criminal acts.⁶ This protection was necessary, the Court reasoned, because of the transitory nature of students' scholastic residence and their inability, due to the brevity of their residence, to design and implement a security system on their own initiative.⁷ The Court concluded that colleges must take responsibility for implementing and maintaining security systems if anything is to be done at all.⁸

In addition to the duty required by custom and community values, the Court also concluded that the duty of due care in *Mullins* was grounded in the principle that "a duty voluntarily assumed must be performed with due care."⁹ Consistent with this formulation, the Court recognized that the mere fact that a service has been voluntarily rendered is not by itself sufficient to impose a duty of due care.¹⁰ The Court further observed that it must also be shown either that the school's failure to exercise due care increased the risk of harm, or that the harm was suffered because of the student's reliance on the school's undertaking.¹¹ Although the Court did not determine whether the plaintiff or her family in fact relied on Pine Manor's representations or actions, it concluded that students and their parents rely on colleges to safeguard the students' well-being, and that prospective students and parents are certain to note the presence or absence of security measures and may choose to register elsewhere if a particular college's precautions are unsatisfactory.¹² Moreover, the Court found that, implicit in Pine Manor's requirement that freshmen, such as the plaintiff, live in dormitories was the representation that the college believed it could provide adequately for the dormitory residents' safety and well-being.¹³ Finally, the Court noted that a duty of care arising out of

⁴ *Id.*

⁵ *Id.* at 51-52, 449 N.E.2d at 335.

⁶ *See id.* at 51, 449 N.E.2d at 335.

⁷ *Id.* at 50-52, 449 N.E.2d at 335.

⁸ *Id.* at 52, 449 N.E.2d at 335. The Court stated: "The fact that a college need not police the morals of its resident students . . . does not entitle it to abandon any effort to ensure their physical safety." *Id.*

⁹ *Id.* at 52-53, 449 N.E.2d at 336. *See Black v. New York, N.H., & H.R.R.*, 193 Mass. 448, 79 N.E.2d 797 (1907); RESTATEMENT (SECOND) OF TORTS § 323 (1965).

¹⁰ 389 Mass at 54-55, 449 N.E.2d at 336.

¹¹ *Id.* at 54, 449 N.E.2d at 336.

¹² *Id.*

¹³ *Id.* at 54 n.11, 449 N.E.2d at 337 n.11.

a particular relationship between the parties is embedded in Massachusetts case law.¹⁴

Turning to Pine Manor's argument that the criminal attack on the student was not foreseeable, the *Mullins* Court refused to apply the principle that "an owner or occupier of land is under no duty to protect persons lawfully on the premises against the criminal acts of third persons unless prior criminal acts occurred on the premises."¹⁵ This general doctrine, the Court reasoned, implicates a wide range of interests not present in the distinctive relationship between colleges and their students.¹⁶ The question whether an event is foreseeable, the Court stated, turns on an examination of all the circumstances, with prior criminal acts only one factor among many which serve to establish the foreseeability of a third party's criminal act.¹⁷ Reviewing the facts in *Mullins*, the Court concluded that the risk of criminal acts such as rape being committed on campus was not only foreseeable but had actually been foreseen, as evidenced by the warnings given to the students during freshman orientation.¹⁸

The Court's decision in *Mullins v. Pine Manor College* is an important addition to Massachusetts tort law. The *Mullins* Court broke new ground in extending tort liability to colleges which fail to take adequate steps to ensure that campus security adequately protects its resident students. Following this decision, Massachusetts colleges and universities would do well to carefully review the adequacy of their current campus security measures, because *Mullins* has set forth a fairly rigorous standard of due care for campus security departments to meet.

¹⁴ 389 Mass. at 53 n.9, 449 N.E.2d at 336 n.9.

¹⁵ *Id.* at 55, 449 N.E.2d at 337.

¹⁶ *Id.* at 56, 449 N.E.2d at 337.

¹⁷ *Id.* See *Mounsey v. Ellard*, 363 Mass. 693, 708-09, 297 N.E.2d 43, 53 (1973). The *Mounsey* Court stated that the "'reasonable care in all the circumstances' standard will allow the jury to determine what burdens of care are unreasonable in light of the relative expense and difficulty they impose on the owner or occupier as weight against the probability and seriousness of the foreseeable harm to others." *Id.* Because in *Mounsey* the relationship between the plaintiff and defendant was that of a mere owner or occupier of land and a person lawfully upon the premises, it is likely that the principle which precludes liability for criminal acts of third persons unless prior criminal acts have already occurred on the premises, is of limited application in Massachusetts even outside "the distinctive relationship" in *Mullins* of college and student.

¹⁸ 389 Mass. at 54-55, 449 N.E.2d at 337. The Court also reviewed the sufficiency of the evidence before it in evaluating the plaintiffs negligence claim, and held that a jury could reasonably have found that the evidence supported the conclusions (1) that the school was negligent; and (2) that the school's negligence caused the plaintiff's injury. *Id.* at 56-63, 449 N.E.2d at 338-41. In addition, the Court refused to apply the charitable immunity doctrine in this case to shield the college's vice-president from liability, and rejected the vice-president's contention that officers of charitable institutions should not be held liable for the negligent performance of discretionary functions without a showing of bad faith. *Id.* at 63-64, 449 N.E.2d at 341-42.

§ 10.5. Mental Distress — Good Samaritan Doctrine. In *Barnes v. Geiger*, the complaint alleged that a mother had witnessed an accident in which she mistakenly believed her son was injured and accordingly rushed to the scene to aid the victim.¹ It was further alleged that although the victim was not her son, the mother nevertheless suffered severe emotional distress as a result of viewing the victim and died the following day.² Her husband brought suit both in his own right and as administrator of his deceased wife's estate, seeking damages for her death and conscious suffering, for loss of consortium and for consequential damages.³ The trial court dismissed the complaint as failing to state a claim upon which relief could be granted.⁴

In affirming, the Appeals Court found the complaint deficient on both of the grounds upon which it could possibly be based.⁵ First, according to the court, the plaintiff failed to state a valid claim for physical injury based upon mental distress⁶ under *Dziokonski v. Babineau*.⁷ In *Dziokonski*, the Supreme Judicial Court held that a negligent action would lie against the driver of a car which struck a child upon allegations that the child's mother suffered emotional shock and consequent death when she went to the scene of an accident and saw her daughter lying injured on the ground.⁸ The Appeals Court in *Barnes*, was unwilling to extend *Dziokonski* by making tortfeasors liable to an unrelated person who mistakenly believes her child has been hurt.⁹ The requested extension, the court noted, would expand "unreasonably the class of persons to whom a tortfeasor may be liable."¹⁰ Expressing the issue in terms of foreseeability, the *Barnes* court stated that physical trauma and resulting physical injury to a person who mistakenly believes a close family member to be the victim of an observed accident is beyond that which is reasonably foreseeable.¹¹ This conclusion, the court readily admitted, was a pragma-

§ 10.5. ¹ 15 Mass. App. Ct. 365, 446 N.E.2d 78 (1983).

² *Id.* at 365-66, 446 N.E.2d at 79.

³ *Id.* at 365, 446 N.E.2d at 79.

⁴ *Id.* at 366, 446 N.E.2d at 79.

⁵ *Id.* at 366, 446 N.E.2d at 80.

⁶ *Id.* at 366-69, 446 N.E.2d at 80-81.

⁷ 375 Mass. 555, 380 N.E.2d 1295 (1978).

⁸ *Id.* at 557, 568, 380 N.E.2d at 1296, 1302.

⁹ 15 Mass. App. Ct. at 367-68, 446 N.E.2d at 80-81. In dicta, the court analogized mistakes about the identity of the victim with all mistakes concerning the circumstances of the accident, including mistake as to the gravity of the injury. *Id.* at 368, 446 N.E.2d at 81.

¹⁰ *Id.*

¹¹ *Id.* at 368-69, 446 N.E.2d at 81. *Cf. Dziokonski*, 375 Mass. at 567, 380 N.E.2d at 1302 (reasonably foreseeable that, if one negligently operates a motor vehicle and injures another, at least one person will be sufficiently attached emotionally to the injured person that he will be affected).

tic judgment rather than the systematic application of a general principle.¹²

The *Barnes* court also rejected the plaintiff's second theory which attempted to premise the liability of the defendant upon the rescue doctrine.¹³ Under this doctrine, the court observed, negligence which creates peril invites rescue and, should the rescuer be hurt in the process, the tortfeasor is liable to both the primary victim and the rescuer.¹⁴ According to the court, the rescue doctrine should not be extended to all onlookers and would be rescuers simply because danger invites rescue and accidents invite onlookers.¹⁵ The court therefore concluded that to achieve the status of a rescuer, a claimant's purpose must be more than investigatory, and some specific, reasonable mission to assist the victim must be asserted.¹⁶ Finally, the court noted that *Dziokonski* established that a close familial relationship must exist to set in motion the psychic trauma-physical damage sequence, and concluded that this limitation would be effectively negated if the court found allegations of an undefined intent to rescue actionable.¹⁷

§ 10.6. Economic Harm — Negligence — Public Nuisance. The traditional concern about recovery of economic harm was the focus of the Supreme Judicial Court's decision in *Stop & Shop Cos. v. Fisher*.¹ In *Fisher*, the defendants' vessels, by negligently colliding with and obstructing a drawbridge, substantially impaired access to two retail stores, allegedly causing the plaintiff, Stop & Shop Companies, Inc. ("Stop & Shop"), to suffer economic harm from the loss of business revenues.² Stop & Shop brought suit based upon theories of negligence and public nuisance.³ The trial court dismissed both counts and granted summary judgment for the defendants.⁴

On appeal, the Supreme Judicial Court acknowledged that the question whether to allow recovery for negligently caused economic harm is one of policy.⁵ The Court further stated that the focus of this policy-oriented question is on determining at what point the tortfeasor's liability should

¹² 15 Mass. App. Ct. at 369, 446 N.E.2d at 81 (citing *Payton v. Abbot Labs*, 386 Mass. 540, 555-56, 437 N.E.2d 171, 180 (1982) (no right of action for emotional distress caused by negligence in the absence of physical harm)).

¹³ 15 Mass. App. Ct. at 369-71, 446 N.E.2d at 81-82.

¹⁴ *Id.* at 369, 446 N.E.2d at 81.

¹⁵ *Id.* at 371, 446 N.E.2d at 82.

¹⁶ *Id.*

¹⁷ *Id.*

§ 10.6. ¹ 387 Mass. 889, 444 N.E.2d 368 (1983).

² *Id.* at 889, 444 N.E.2d at 369.

³ *Id.*

⁴ *Id.* at 891, 444 N.E.2d at 370.

⁵ *Id.* at 896, 444 N.E.2d at 373.

stop.⁶ Massachusetts had previously allowed negligence claims for recovery of economic loss only where the plaintiff alleged some accompanying physical harm — either personal injury or physical damage to the plaintiff's property.⁷ In *Newlin v. New England Telephone & Telegraph Co.*,⁸ for example, the plaintiff sought to recover for economic loss caused by the defendant's negligent maintenance of a telephone pole which fell, disrupting electric power to a plant where plaintiff had stored its perishable mushroom crop.⁹ Recovery was allowed for the economic loss due to the destruction of the mushrooms.¹⁰ Noting that Stop & Shop alleged no such damage to property, the Supreme Judicial Court denied the negligence claim.¹¹ In doing so, the Court relied upon section 766(C) Restatement (Second) of Torts. Section 766(C) denies recovery for pecuniary harm which does not stem from physical injury resulting from the defendant's negligent interference with the plaintiff's efforts to acquire a contractual relation with a third person.¹²

Although the Court rejected the negligence claim, it accepted Stop & Shop's claim alleging economic harm suffered as a result of a negligently caused public nuisance.¹³ The Court noted that only a limited number of negligent acts generally give rise to public nuisances, particularly to obstructions of public ways.¹⁴ Therefore, according to the Court, the reasons for denying recovery on a general negligence theory were inapplicable, especially in light of both the degree of harm required for such an obstruction to amount to a public nuisance, and the dependence of businesses and their customers on access to business establishments.¹⁵

Moreover, the Court observed that the initial question in a public nuisance damage suit is whether the plaintiff has sustained some special and unique damage, different in kind and not merely in degree, from that experienced by others due to the alleged nuisance.¹⁶ In the absence of

⁶ *Id.* at 896-97, 444 N.E.2d at 373.

⁷ *See, e.g.,* *Kilduff v. Plymouth County Elec., Co.*, 348 Mass. 328, 330-31, 203 N.E.2d 679, 680 (1965); *Morani v. Agatha Fisheries, Inc.*, 213 F. Supp. 257, 259-60 (D. Mass. 1963); *Newlin v. New England Tel. & Tel. Co.*, 316 Mass. 234, 235, 54 N.E. 929, 931 (1944).

⁸ 316 Mass. 234, 54 N.E. 929 (1944).

⁹ *Id.* at 235, 54 N.E. at 930.

¹⁰ *Id.* at 237-38, 54 N.E. at 931.

¹¹ 387 Mass. at 894, 444 N.E.2d at 371.

¹² *Id.* at 893-94, 444 N.E.2d at 371. *See* RESTATEMENT (SECOND) OF TORTS, § 766(C) (1977).

¹³ 387 Mass. at 896, 444 N.E.2d at 374.

¹⁴ *Id.* at 897, 444 N.E.2d at 373.

¹⁵ *Id.* The Court noted that a majority of federal cases have resolved the issue differently, denying recovery for economic loss resulting from a public way obstruction on both negligence and public nuisance theories. *Id.* at 896 & n.4, 444 N.E.2d at 372-73 & n.4.

¹⁶ *Id.* at 894, 444 N.E.2d at 372 (quoting *Willard v. Cambridge*, 85 Mass. (3 Allen) 574, 575 (1862)).

physical harm to the plaintiff's property, the Court stated, obstruction of a public way resulted in actionable damage under the old Massachusetts rule only if the obstruction cut off immediate access to a public highway or river from the plaintiff's premises.¹⁷ Noting that strict adherence to this rule could preclude recovery even when an established business is "virtually destroyed," the Court held that an established business may "state a claim in nuisance for severe economic harm resulting from loss of access to its premises by its customers."¹⁸ The Court then found that a cause of action existed in *Fisher*, stressing the unique impact which a public nuisance obstruction may have on a business.¹⁹ Acknowledging that the old rule decreased the number of lawsuits by setting up a clear and restrictive line between special and general damages, the court nevertheless concluded that the rule's clarity did not compensate for its preclusion of all claims, even those where a viable business is virtually destroyed.²⁰

Limiting the reach of its decision, the *Fisher* Court stressed that liability for economic loss caused by negligent obstruction of a public way will exist only where the plaintiff has suffered both severe pecuniary loss and substantial impairment of access.²¹ The Court stressed that both of these issues are questions of degree.²² The requirement that pecuniary loss be severe is a direct limitation on the number of potential plaintiffs who can bring suit for public nuisance damages. If so many businesses have suffered the same economic harm that the plaintiff's damages are no longer special, the Court concluded, no cause of action would exist because the harm would then be public rather than unique.²³ According to the Court, the requirement that the impairment of access be severe also limits liability. In giving courts guidance for determining when an impairment is "substantial," the Court referred to the reasoning in property-taking cases.²⁴ The *Fisher* Court stated that courts should examine the existence, availability and feasibility of alternate routes onto the property in question, along with the purposes for which the property has been used, when determining whether the plaintiff, or customers who previously had a reasonable relation to a road system reaching the property, have been left without such access.²⁵

¹⁷ 387 Mass. at 894-95, 444 N.E.2d at 372.

¹⁸ *Id.*

¹⁹ *Id.* at 897, 444 N.E.2d at 373.

²⁰ *Id.* at 895, 444 N.E.2d at 372.

²¹ *Id.* at 899, 444 N.E.2d at 374.

²² *Id.*

²³ *Id.* at 897, 444 N.E.2d at 373.

²⁴ *Id.* at 897-99, 444 N.E.2d at 373. See, e.g., *Malone v. Commonwealth*, 378 Mass. 74, 80, 389 N.E.2d 975, 979 (1979); *Stanwood v. Malden*, 157 Mass. 17, 18 (1892).

²⁵ 387 Mass. at 898, 444 N.E.2d at 374 (quoting *Malone v. Commonwealth*, 378 Mass. 79, 80, 389 N.E.2d 975, 979 (1979)).

The *Fisher* Court's finding of special damage is somewhat consistent with prior Massachusetts law because the "immediate access" requirement under the old rule would allow recovery for economic harm in the absence of direct property damage. The alleged impairment of access in *Fisher*, however, although substantial, was not direct, and hence failed under the old rule. The Court in *Fisher* thus extended liability in public nuisance cases to established businesses that suffer substantial curtailment of access and severe pecuniary loss.

The *Fisher* decision also suggests that in the future Massachusetts may further expand liability and follow *Burgess v. M/V Tamano*,²⁶ a seminal case in this area. In *Tamano*, commercial fishermen were allowed to recover for loss of livelihood caused by the defendant's negligent spillage of oil in a river, although hotel owners and other businesses along the beach were denied recovery for their loss of tourist-customers.²⁷ At first glance, the reasoning in *Fisher* would seem contrary to that in *Tamano*. For example, the Court's holding in *Fisher* applies only to public nuisances which have caused severe economic harm to established businesses due to substantial impairment of access, and therefore neither class of plaintiffs in *Tamano* would have recovered under the reasoning in *Fisher*.²⁸ In addition, both plaintiff classes in *Tamano* were large, implicating the *Fisher* Court's concern that liability for negligently caused economic loss be strictly limited.²⁹ Furthermore, the *Fisher* Court concluded that when an entire community economically suffers from a nuisance then the wrong becomes public and the plaintiffs cannot recover.³⁰ Nevertheless, the fishermen's allegations in *Tamano* of interference with their direct exercise of a public right, were deemed sufficiently different in kind from that suffered by the public generally so as to warrant a nuisance claim for recovery.³¹ The *Fisher* Court similarly emphasized the uniqueness of the economic harm suffered by the plaintiff-business. The decision in *Fisher* may signal a relaxation of hitherto rigidly applied liability rules which limit negligence in Massachusetts. If such is the case, the Supreme Judicial Court might follow the reasoning of the *Tamano* decision in future cases and allow recovery to a broader class of plaintiffs to whom negligent behavior has caused purely economic harm.

§ 10.7. Vicarious Liability — Inherently Dangerous Activity — Employers of Independent Contractors. In *Vertentes v. Barletta Co.*,¹ a case of

²⁶ 370 F. Supp. 247 (D. Me. 1973).

²⁷ *Id.* at 250-51.

²⁸ 387 Mass. at 899, 444 N.E.2d at 374.

²⁹ *Id.* at 896, 444 N.E.2d at 372.

³⁰ *Id.* at 897, 444 N.E.2d at 373.

³¹ 370 F. Supp. at 250.

§ 10.7. ¹ 16 Mass. App. Ct. 463, 452 N.E.2d 271 (1983).

first impression in Massachusetts, the Appeals Court held that a general contractor, the employer of an independent contractor, was not liable for injuries to employees of the independent contractor caused by the negligence of either that contractor or other independent contractors solely on the theory that the delegated work was inherently dangerous.² In this case, the plaintiff-employee sustained severe injuries when struck by a motor vehicle during the course of his employment as a construction worker on a highway rebuilding project.³

In reaching its decision, the *Vertentes* court followed the general rule that employers of independent contractors are not liable for physical harm to others caused by the negligence of the contractor.⁴ The court distinguished cases involving injury to members of the general public by employers of independent contractors. Under this exception to the general rule, where the work to be performed is likely to cause physical harm to members of the general public absent adequate precautions, the employer of an independent contractor is answerable in tort for the contractor's failure to take such precautions.⁵ The court observed that those who request the performance of work of such an intrinsically dangerous nature that members of the general public will likely be injured unless special precautions are taken should not be allowed to escape liability through the device of a contract with an independent contractor.⁶ According to the court, employees do not stand in the same position as the general public, who may not be aware of the dangerous nature of the activity.⁷ Imposing liability on a general contractor in this situation, the court concluded, would depart substantially from the grounds which underlie the doctrine of vicarious liability for inherently dangerous work.⁸

The *Vertentes* court also relied on the availability of worker's compensation for employees like the plaintiff who are injured while on the job.⁹ Cautioning that courts should be hesitant to tinker with the legislatively enacted worker's compensation system, the court concluded that allowing recovery by an injured subcontractor's employee against the general contractor would create an imbalance in the system's present allocation of risks.¹⁰ Thus, the court observed that imposing liability against a general contractor who employs an independent contractor to perform inherently

² *Id.* at 468, 452 N.E.2d at 274.

³ *Id.* at 463, 452 N.E.2d at 272.

⁴ *Id.* at 466, 452 N.E.2d at 273. *See also*, RESTATEMENT (SECOND) OF TORTS § 409 (1966). *Whalen v. Shivek*, 362 Mass. 142, 150, 93 N.E.2d 393, 395-97 (1950).

⁵ 16 Mass. App. Ct. at 468, 452 N.E.2d at 274.

⁶ *Id.*

⁷ *Id.* at 468 n.7, 452 N.E.2d at 274 n.7.

⁸ *Id.* at 468-69, 452 N.E.2d at 274.

⁹ *Id.* at 469, 452 N.E.2d at 274-75.

¹⁰ *Id.*

dangerous work might cause general contractors to demand indemnity from its subcontractors to pay for the cost of possible employee tort recoveries.¹¹ Conversely, the court observed, without such a right to indemnity, a disproportionately large burden would fall on employers engaged in hazardous work who employ subcontractors to perform part or all of that work.¹²

Finally, the *Vertentes* court concluded that the general contractor was not directly liable for its failure to discover the condition which resulted in the plaintiff's injury, despite the fact that it retained ultimate responsibility for correcting safety deficiencies, patrolling the entire construction zone and ascertaining that proper procedures had been followed.¹³ Noting the lack of evidence that the defendant general contractor had been delinquent in its inspections of the work site on the day of the plaintiff's injury or that it had actual or constructive notice of any hazard, the court concluded that a finding of negligence would merely be based on surmise and not on any evidence before it.¹⁴

In summary, the Appeals Court in *Vertentes* failed to adopt a rule which would permit injured employees of a subcontractor to successfully sue the general contractor on a vicarious liability theory. Instead, the *Vertentes* court decided that, in Massachusetts, general contractors are not liable in negligence to employees of subsidiary independent contractors solely on the ground that the delegated work was of an inherently dangerous nature.¹⁵

§ 10.8. Immunity — Governmental — Discretionary Function Exception. *Cady v. Plymouth Carver Regional School District*¹ provided Massachusetts with its first opportunity to construe the "discretionary function" exception contained in Section 10(b) of the 1978 Massachusetts Tort Claims Act.² This provision provides that the Act shall not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused."³ Following an extensive discussion of federal cases construing similar language in the Federal Tort Claims Act,⁴ the *Cady* court concluded that when a public employee

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 470-71, 452 N.E.2d at 275-76.

¹⁴ *Id.*

¹⁵ *Id.* at 468, 452 N.E.2d at 274.

§ 10.8. ¹ 17 Mass. App. Ct. 211, 457 N.E.2d 294 (1983).

² *Id.* at 213, 457 N.E.2d at 296. See G.L. c. 258, § 15.

³ G.L. c. 258, § 510(b).

⁴ 28 U.S.C. § 2680(a) (1976).

is required to decide and act without fixed or readily ascertainable standards to fall back upon, that act is discretionary and therefore is entitled to tort immunity.⁵ Conversely, the court concluded that, if a standard by which a governmental action may be measured is readily ascertainable, whether or not written or the product of experience, it does not fall within the discretionary function exception.⁶ Based upon its formulation of the appropriate standard by which to measure a challenged governmental action, the *Cady* court held that where the defendant school officials had allowed two students who had attacked the student plaintiff to return to school following temporary suspension without taking precautions to safeguard the plaintiff from further harm, the governmental acts fell within the discretionary function exception.⁷

The *Cady* “fixed or readily ascertainable” standard differs from the formulation previously articulated by the Supreme Judicial Court in *Whitney v. Worcester*,⁸ an opinion which played an instrumental role in the Massachusetts Legislature’s development and enactment of the Tort Claims Act. In *Whitney*, the Court stated that the dividing line between protected and unprotected activities fell between functions which rest on the use of judgment and discretion and represent planning and policymaking, and those which involve implementing and executing such governmental policy or planning.⁹ The court’s decision in *Cady*, along with its formulation of the appropriate standard by which to differentiate between protected and unprotected governmental activities, is narrower in scope than was the *Whitney* Court’s articulation of the appropriate standard. Under the *Whitney* formulation, those employees who implemented and executed governmental policies did not fall within the exception to the tort liability. Under *Cady*, however, those governmental employees who implement or execute policies are exempt if they act without fixed or readily ascertainable standards. Whether the *Whitney* or *Cady* approach is ultimately adopted by Massachusetts courts remains to be seen.

§ 10.9. Immunity — Interspousal. During the *Survey* year another case was decided rejecting interspousal immunity as a barrier to an action in tort. In *Nogueira v. Nogueira*¹ the Supreme Judicial Court adhered to its earlier broad rejection of this immunity in *Brown v. Brown*.² Although *Nogueira* contains unfortunate language which, if improperly read, sug-

⁵ 17 Mass. App. Ct. at 215, 457 N.E.2d at 297.

⁶ *Id.*

⁷ *Id.* at 216, 457 N.E.2d at 297.

⁸ 373 Mass. 208, 366 N.E.2d 1210 (1977).

⁹ *Id.* at 217, 366 N.E.2d at 1216.

§ 10.9. ¹ 388 Mass. 79, 444 N.E.2d 940 (1983).

² 381 Mass. 231, 409 N.E.2d 717 (1980).

gests a limitation of *Brown*, the *Nogueira* language is a result only of the particular factual situation presented.

In 1976, the Supreme Judicial Court in *Lewis v. Lewis*³ first held that the common law rule of interspousal immunity does not bar an action by a wife against her husband for injuries sustained by her in an automobile accident resulting from his negligence.⁴ *Brown v. Brown* extended this doctrine beyond automobile torts to all actions for personal injury.⁵ The Court in *Brown* allowed a wife's claim that her husband was negligent in causing her injury by failing to take proper care of property jointly owned by the couple.⁶ The *Brown* Court recognized that the marital relationship might still serve as a bar to some actions, but noted that this denial of liability is not grounded on interspousal immunity.⁷ Rather, according to the Court, it rests on the marital concessions implied in the relationship, specifically the "privileged or consensual aspects of married life."⁸

In *Nogueira*, the Supreme Judicial Court relied on *Brown* in reversing the trial court's dismissal of a complaint based on interspousal immunity.⁹ The issue arose in the context of a suit brought by a husband against his wife for libel and intentional infliction of emotional distress based upon a letter she wrote four days after the entry of judgment nisi in their divorce suit.¹⁰ In reversing the lower court's grant of summary judgment, the *Nogueira* Court observed that tortious behavior which occurs after the entry of a judgment nisi does not affect the privileged or consensual aspects of married life.¹¹

To this point, *Nogueira* is clearly consistent with *Brown*. The *Nogueira* Court, however, further noted that, because of the initiation of divorce proceedings, nothing but a shell of the marital relationship remained at the time the torts were allegedly committed.¹² This unfortunate language, suggesting that the Court carefully considered the health of the Nogueiras' marriage at the time the torts in issue were committed, is not a part of the focus in *Brown*. It is best viewed as a response by the *Nogueira* Court to the plaintiff's contention that *Lewis*, and not *Brown*, should be the controlling precedent.¹³ The *Nogueira* Court noted that, as stated in *Lewis*, the chief policy reason why under appropriate circumstances, it

³ 370 Mass. 519, 351 N.E.2d 526 (1976).

⁴ *Id.* at 630, 351 N.E.2d at 532.

⁵ 381 Mass. at 233, 409 N.E.2d at 718-19.

⁶ *Id.* at 231, 409 N.E.2d at 719.

⁷ *Id.*

⁸ *Id.*

⁹ 388 Mass. at 81, 444 N.E.2d at 941.

¹⁰ *Id.*

¹¹ *Id.* at 80, 444 N.E.2d at 941.

¹² *Id.* at 82, 444 N.E.2d at 942.

¹³ *Id.* at 80, 444 N.E.2d at 941.

will still consider the status of the marital relationship as a bar to certain tort actions is preservation of the peace and harmony of the marital home.¹⁴ It concluded, however, that where marital harmony no longer exists, as in *Nogueira*, there can be no question of a bar to an action in tort.¹⁵

§ 10.10. Privilege — Resistance to Unlawful Arrest. The Supreme Judicial Court in *Commonwealth v. Moreira*¹ reviewed the common law rule that a person has the right to use force to resist an unlawful arrest. Massachusetts had adopted this principle in *Commonwealth v. Crotty* in 1865.² The recent trend in the United States, however, has been away from this old rule and toward the resolution of disputes in court.³ The *Moreira* Court decided to follow this trend, concluding that the common law rule is no longer consistent with the needs of modern society and should no longer be followed.⁴

The *Moreira* Court based its decision principally on the number of legal remedies available to those unlawfully arrested. The Court concluded that, in view of constantly expanding legal protection of the accused's rights in criminal proceedings, arrestees reasonably may be required to submit to a possibly unlawful arrest and to take recourse in available legal processes to restore their liberty.⁵ Included in these legal processes are liberal bail laws, appointed counsel, the right to remain silent, speedy arraignment and speedy trial.⁶ The Court further opined that arrestee "self-help" is anti-social in an urban society.⁷ Moreover, the Court observed, the legality of an arrest may often be a close question about which lawyers and judges disagree.⁸ The Court concluded that such a close question is more properly decided by a detached magistrate rather than by the participants in what may well be a "highly volatile imbroglio."⁹

In addition, the Court held that, absent excessive or unnecessary force by an arresting officer, individuals may not use force to resist an arrest by one whom they know or have good reason to believe is an authorized police officer engaged in the performance of his duties, regardless of

¹⁴ *Id.* at 81-82, 444 N.E.2d at 942.

¹⁵ *Id.* at 82, 444 N.E.2d at 942.

§ 10.10. ¹ 388 Mass. 596, 447 N.E.2d 1224 (1983).

² 10 Allen 403, 405 (1865).

³ 388 Mass. at 599, 447 N.E.2d at 1226.

⁴ *Id.*

⁵ *Id.* at 599-600, 447 N.E.2d at 1227.

⁶ *Id.* at 600, 447 N.E.2d at 1227.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

whether the arrest was unlawful under the circumstances.¹⁰ Where, however, the officer uses excessive or unnecessary force in his attempt to subdue the arrestee, regardless of whether the arrest is lawful or unlawful. The rules pertaining to self-defense apply.¹¹ The arrestee may then defend himself by employing such force as reasonably necessary to repel the excessive force being applied to him.¹² The Court warned that once the arrestee knows or reasonably should know that if he desists from using force in self-defense, then the officer himself will cease using force, the arrestee must desist or he will forfeit the self-defense privilege.¹³ According to the Court, the questions whether the officer used excessive force and whether the arrestee used reasonable force to resist the excessive force are questions of fact to be resolved by the jury on proper instruction by the trial judge.¹⁴

§ 10.11. Statute of Limitations — Discovery Rule. In *Olsen v. Bell Telephone Laboratories, Inc.*,¹ the Supreme Judicial Court determined that the discovery rule, first articulated in *Hendrickson v. Sears*,² governs when a cause of action for negligence resulting in an insidious occupational disease accrues under chapter 260, section 2A.³ In *Olsen*, suit was brought to recover for negligence in causing bronchial asthma through the plaintiff's exposure to a toxic substance in the course of his employment.⁴ The Court ruled that a cause of action accrued for the purpose of chapter 260, section 2A, on the date the plaintiff "discovered or should reasonably have discovered" that he had contracted asthma as a result of the defendants' conduct.⁵ In so ruling, the Court rejected the plaintiff's argument that the cause of action for a claim for permanent injury accrues at the time at which "the permanency is, or should have been discovered."⁶

The argument that the extent of the injury, and not the knowledge of its existence, determines the accrual date was rightfully rejected by the Court in light of the purpose behind the discovery rule. As stated in *Franklin v. Albert*,⁷ the discovery rule is designed to cure the manifest

¹⁰ *Id.* at 601, 447 N.E.2d at 1227. This rule is to apply to incidents occurring after the date of the decision. *Id.* Cases to the contrary in the Commonwealth are overruled to this degree. *Id.*

¹¹ *Id.* at 601, 447 N.E.2d at 1228.

¹² *Id.*

¹³ *Id.* at 602, 447 N.E.2d at 1228.

¹⁴ *Id.*

§ 10.11. ¹ 388 Mass. 171, 445 N.E.2d 609 (1983).

² 365 Mass. 83, 310 N.E.2d 131 (1974).

³ 388 Mass. at 175-76, 445 N.E.2d at 612.

⁴ *Id.* at 172, 445 N.E.2d at 610.

⁵ *Id.* at 175, 445 N.E.2d at 612.

⁶ *Id.*

⁷ 381 Mass. 611, 411 N.E.2d 458 (1980).

injustice that would result from application of the traditional rule that a cause of action arises at the time of the commission of the tort.⁸ If strictly followed, the traditional rule would operate to punish blameless ignorance, as contrasted with negligent delay, by holding a cause of action time-barred before the plaintiff reasonably could know of the harm that he has suffered.⁹ To avoid such an unjust result, the discovery rule deviates from the policy of promoting societal repose embodied in statutes of limitation.¹⁰ As the *Olsen* Court noted, acceptance of the plaintiff's argument would create an unacceptable imbalance between affording plaintiffs remedies and providing defendants with a finite period of potential liability.¹¹

Not decided in *Olsen* was the question whether the statutory period commenced with the discovery of the harm itself or with the discovery that it was caused by conduct for which the defendant was responsible. *Olsen* provided the opportunity for resolution of this question because the plaintiff's disease became worse after discontinuance of his exposure to the toxic substance in question, a phenomenon suggesting that exposure was not the cause of his harm. The plaintiff, however, had been informed during an early diagnosis of his illness that the toxic substance in question had probably played a significant role in causing his symptoms.¹² Consequently, there was evidence from which the Court might have concluded that the plaintiff's knowledge, both of the harm and its cause, was contemporaneous. While the holding is ambiguous on this point, the Court did rely upon a case which indicated that the statute of limitations would not begin running until the plaintiff became aware of the causal connection to the defendant's conduct, even if this occurred subsequent to his knowledge of the existence of the harm itself.¹³

Olsen also failed to answer the question, left unresolved in *Hendrickson*,¹⁴ whether the plaintiff's cause of action would have "accrued on the discovery of inappreciable harm."¹⁵ This issue was not clearly raised in *Olsen* because the facts established that the plaintiff knew from

⁸ *Id.* at 612, 411 N.E.2d at 459-60.

⁹ *Id.* at 618, 411 N.E.2d at 463.

¹⁰ *Id.* at 617-18, 411 N.E.2d at 462-63.

¹¹ 388 Mass. at 173, 445 N.E.2d at 612.

¹² *Id.* at 173, 445 N.E.2d at 611.

¹³ *Id.* at 176, 445 N.E.2d at 612. See *Fearson v. Johns-Manville Sales Corp.*, 323 F. Supp. 671, 674 (D.D.C. 1931). ("Under the 'discovery rule' which has been applied in both cases of medical malpractice and latent occupational diseases, the statute of limitations begins to run when the plaintiff learned, or in exercise of reasonable diligence could have learned, that the injuries were caused by defendant's actions.")

¹⁴ 365 Mass. at 91, 310 N.E.2d at 136. "We do not consider the question whether a cause of action would accrue on discover in the absence of appreciable harm." *Id.*

¹⁵ 388 Mass. at 171, 445 N.E.2d at 612.

the beginning that he would experience a severe disability.¹⁶ Furthermore, *Olsen* is distinguishable from cases in which plaintiffs suffer successive but distinct injuries — for example, asbestosis followed by the unrelated disease of cancer.¹⁷ Because a plaintiff may reasonably be expected to find out about the seriousness of a disease at the time when it is diagnosed, the plaintiff is placed on notice of the severity of his disease as soon as he learns of its existence. By contrast, a plaintiff who discovers a second disease, wholly unrelated to the first, is in no way placed on notice as to the existence of his second disease by knowledge of the former. Consequently, the statute of limitations should begin anew for a plaintiff with a second distinct disease.

¹⁶ *Id.* at 173, 445 N.E.2d at 611.

¹⁷ *Id.* at 176, 445 N.E.2d at 612.